STATE OF MICHIGAN

COURT OF APPEALS

BEATRICE BAUR,

Plaintiff-Appellant,

v

MACOMB MALL, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
February 27, 2007

No. 271474
Macomb Circuit Court
LC No. 2005-002612-NO

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals the trial court's order that granted summary disposition to defendant. We affirm.

Plaintiff Beatrice Baur tripped when her toe was caught in a small gap between the asphalt parking lot and the concrete curb at Macomb Mall. Plaintiff testified that she did not see the hazardous condition as she walked from the parking lot to the sidewalk. When she returned after the accident to observe the area, however, she saw the condition that she claims caused her fall. Plaintiff argued that the condition was not open and obvious and that it was unusual and unreasonably dangerous. The trial court disagreed, and it granted defendant's motion for summary disposition.[1]

A landowner has a duty "to exercise reasonable care to protect an invitee from unreasonable risk of harm caused by a dangerous condition on the land." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-610; 537 NW2d 185 (1995). A landowner is not an absolute insurer of the safety of his/her invitees. *Id.* at 614. However, as our Supreme Court explained in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001):

[1] This Court reviews a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) de novo, and we consider the pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmovant. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 41-42; 672 NW2d 884 (2003). If the evidence fails to demonstrate a genuine issue of material fact, then the movant is entitled to judgment as a matter of law. *Franchino v Franchino*, 263 Mich App 172, 181; 687 NW2d 620 (2004).

> A premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.

Whether a hazard is open and obvious depends on whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993). With respect to whether a condition has a special aspect:

> [T]he critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Lugo, supra* at 517-518.]

The key inquiry is whether reasonable people would disagree about any "special aspects" of the open and obvious condition, specifically whether the condition creates an unreasonable risk or is merely a typical, everyday, open and obvious condition. *Lugo, supra* at 517. In *Lugo*, the Court provided illustrative examples of "special aspects" to underscore this concept: 1) a commercial building with only one exit and standing water on the floor leading to the exit and 2) a 30-foot deep pit in the middle of a parking lot without guards, barriers, or warnings. *Id.* at 518. While both hazards were open and obvious, the former hazard was unavoidable and the latter hazard presented "a substantial risk of death or severe injury." *Id.*

"Special aspects" are not generally present for typical open and obvious conditions. *Id.* at 520. Typical open and obvious conditions are everyday occurrences that ordinarily should be observed by a reasonably prudent person. *Id.* at 520, 523 (a pothole in a parking lot); *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002) (slipping on snow or ice on a sidewalk); *Bertrand, supra* at 618 (slipping on an unmarked cement step); *Novotney, supra* at 473-474 (slipping on a handicap access ramp).

This case involves an everyday occurrence: plaintiff walked from a parking lot to a curbed sidewalk and tripped as she stepped up. Photographs of the accident area clearly showed the black asphalt parking lot and gray cement curb and sidewalk, as well as what appeared to be a slight, dark crack or seam running along the base of the curb where it meets the parking lot. We agree with the trial court that a reasonable person in plaintiff's position on the day of the accident could have observed the open and obvious condition, where the parking lot met the curb. See *Lugo, supra* at 523. In other words, the condition would have been "noticeable to the ordinary user upon casual inspection." See *Novotney, supra* at 475.

Further, the trial court correctly concluded that there were no "special aspects" to the condition that would create an unreasonable risk of harm. *Lugo, supra.* In *Lugo*, the plaintiff tripped on a pothole in a parking lot and, even though debris obscured the pothole, this Court concluded that the condition was open and obvious without any special aspects. *Id.* at 523-524. In *Joyce, supra* at 239-240, this Court held that snow and ice on a sidewalk was an open and

obvious condition, and plaintiff could not demonstrate any "special aspect," even though she testified that she sought an alternative route and unsuccessfully asked for a rug for traction in the snowy conditions. *Id*. This Court reached a similar conclusion in *Corey v Davenport College of Business*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002). In *Corey*, though the plaintiff argued that the condition was unavoidable because the snow and ice covered a step that led into the building, this Court concluded that there was no special aspect because the plaintiff had other entrance alternatives. *Id*. at 6-7. Here, again, plaintiff encountered an every day condition, an area where the parking lot met the curb/sidewalk, and there were no special aspects that made the condition unreasonably dangerous. See *Lugo, supra* at 517-518. The rest of plaintiff's family made their way from the parking lot to the sidewalk without incident, so the hazardous condition was not unavoidable. Moreover, plaintiff fell onto the sidewalk, not from a great height and, therefore, there was no unreasonable risk of serious injury. For these reasons, the trial court correctly granted summary disposition to defendant.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot